

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41449
Docket No. MW-40377
12-3-NRAB-00003-080178**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an assistant roadmaster to perform Maintenance of Way Track Sub-Department work (track inspection) on the Sweetgrass Subdivision between Mile Posts 138.9 and 100.0 between Sweetgrass and Shelby, Montana beginning May 16, 2005 and continuing (System File B-M-1345-H/11-05-0225 BNR).
- (2) The Agreement was violated when the Carrier assigned two (2) assistant roadmasters to perform Maintenance of Way Track Sub-Department work (track inspection) on the Marshall Subdivision between Mile Posts 222.2 and 0.0 between Sioux City, Iowa and Willmar, Minnesota beginning May 16, 2005 and continuing (System File T-D-2942-B/11-05-0251).
- (3) The Agreement was violated when the Carrier assigned an assistant roadmaster to perform Maintenance of Way Track Sub-Department work (track inspection) on the Zap Subdivision between Mile Posts 72.6 and 0.0 between Beulah and Mandan, North Dakota, beginning May 17, 2005 and continuing (System File B-M-1344-H/11-05-0224).

- (4) The Agreement was violated when the Carrier assigned an assistant roadmaster to perform Maintenance of Way Track Sub-Department work (track inspection) on the Gateway Subdivision between Bieber Line Jct. (MP 0.0) and Keddie (MP 202.8) beginning on June 10, 2005 and continuing (System File S-P-1146-G/11-05-0305).
- (5) The Agreement was violated when the Carrier assigned assistant roadmaster S. Figueroa to perform Maintenance of Way Track Sub-Department work (track inspection) on the Gateway Subdivision between Mile Posts 0.0 and 203.0 on June 10, 22 and 24, 2005 (System File S-P-1147-G/11-05-0306).
- (6) As a consequence of the violation referred to in Part (1) above, ‘. . . all employees with seniority on the Seniority District 200 Track Sub-Department Roster 1 Rank A seniority roster and including the position of track inspector, [excluding those employees on a leave of absence personal, medical, disability, officer)] ***’ shall now ‘. . . receive an equal and proportionate share of all hours worked by the Assistant Roadmaster in the performance of the track patrol (track evaluation) work at the appropriate Track Inspector rate of pay, beginning May 16, 2005 and continuing until the position is properly advertised and assigned under the applicable provision of the Collective Bargaining Agreement.’
- (7) As a consequence of the violation referred to in Part (2) above, ‘. . . all employees with seniority on Seniority District 300 Track Sub-Department Roster 1 Rank A seniority roster and including the position of Track Inspector (excluding those on an approved leave of absence, personal, medical and officer) ***’ shall now ‘. . . receive and [sic] equal and proportionate share of all hours worked by the Assistant Roadmasters in the performance of the track patrol (track evaluation) work at the appropriate Track Inspector rate of pay.’

- (8) As a consequence of the violation referred to in Part (3) above, ‘. . . all employees with seniority on the Seniority District 200 Track Sub-Department Roster 1 Rank A seniority roster and including the position of track inspector, [excluding those employees on a leave of absence (personal, medical, disability, officer)] ***’ shall now ‘. . . receive an equal and proportionate share of all hours worked by the Assistant Roadmaster in the performance of the track patrol (track evaluation) work at the appropriate Track Inspector rate of pay, beginning May 17, 2005 and continuing until the position is properly advertised and assigned under the applicable provision of the Collective Bargaining Agreement.’
- (9) As a consequence of the violation referred to in Part (4) above, Claimant J. Ward shall now be compensated at the applicable track inspector rate of pay for all straight time and overtime hours expended by an assistant roadmaster in the performance of the aforesaid work beginning June 10, 2005 and continuing until the position is properly advertised and assigned.
- (10) As a consequence of the violation referred to in Part (5) above, Claimants B. Stenkamp, D. Collins, R. Fitzer, J. Brecht and S. Santos shall now ‘. . . receive and (sic) equal portion of the thirty-two (32) hours pay, for June 10, 22 and 24, 2005, at the overtime rate of time and one-half at the track inspector’s rate of pay.’”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This case arose in May 2005, when the Carrier announced its intention to establish eight new exempt Assistant Roadmaster positions on the Zap, El Paso, Marshall and Gateway Subdivisions to perform what the Organization contends is traditional track inspection work. The multiple claims that arose have been combined into a single case before the Board for adjudication.

Certain of the Carrier's trains transport hazardous cargo, such as dangerous chemicals and various forms of toxic waste. Beginning in the 1970s, the Carrier began using "Route Evaluators" to "ride shotgun" with trains carrying nuclear waste. At the time, there were concerns that anti-nuclear demonstrators could damage tracks and cause accidents. Route Evaluators, who were not bargaining unit employees, traveled in advance of the special trains along their entire route to ensure that there were no problems with the tracks or with other trains on the tracks. Regular track crews would be called out immediately to repair any track defects that the Route Evaluators identified.

Since then, Route Evaluators have been used to provide extra security for trains carrying any type of hazardous waste (sometimes known as "TIH/PIH trains"¹). Carloads of hazardous waste are not mixed with ordinary non-hazardous material that is being shipped. They are aggregated until there are enough cars to put together an entire HazMat train. Because of that, HazMat trains do not run every day or travel on a regular schedule. National security concerns arising out of the 9/11 terrorist attacks heightened awareness of the need for safe, secure passage of such hazardous cargos. Everyone in the industry was reminded of the dangers inherent in hazardous waste trains in January 2005, when an employee for a different carrier failed to realign a switch, resulting in two trains colliding and a deadly chlorine gas

¹ TIH for "toxic inhalant hazard" and PIH for "poison inhalant hazard." The Carrier ships other types of hazardous cargo as well, such as nuclear waste. This Award will refer to all trains carrying hazardous cargo of any type as "HazMat trains."

spill in Graniteville, South Carolina.² Of special concern to BNSF is what are known as “dark territories” – stretches of track outside the positive train control system that have no electronic sensors to identify problems with signals, switches, and so on. Tracks located in dark territories must be visually inspected immediately before a hazardous waste train travels across them in order to avoid the possibility of an accident or hazardous waste spill. All of the subdivisions involved in these claims are in dark territory.

According to the Carrier, a Route Evaluator’s primary responsibility is not to inspect track in a limited geographic area. It is to ensure the safe passage of the specific train to which he or she is assigned along its entire route no matter how many geographic subdivisions or operating districts it passes through. Once the Route Evaluators have inspected the track, no one can access it until after the HazMat train has passed. This is a major reason why the Carrier does not use Track Inspectors: they are assigned to specific geographic operating districts, and the HazMat trains travel across those geographic boundaries. In order to use Track Inspectors, the Carrier would have to call one out each time the train passed into a new geographic subdivision. There is no obligation on the Track Inspectors to respond to a call-out, so the train could be delayed until a willing Track Inspector could be found – if one could be found at all. Because the trains travel irregularly, it is not possible to assign Track Inspectors to them in the ordinary course of things. This is another reason the Carrier uses exempt employees as Route Evaluators: they can be called out at any time.

According to the Organization, the Carrier established the management position of Assistant Roadmaster in order to evade its obligations under the Collective Bargaining Agreement. They can be called out to perform track inspections at any time without the Carrier having to pay overtime or abide by seniority rights under the Agreement. The Assistant Roadmasters in the affected subdivisions are performing work that has been historically and traditionally performed by Track Inspectors. Accordingly, the Carrier violated the Agreement when it assigned Assistant Roadmasters to perform Maintenance of Way Track Sub-Department work. It is well established by prior Awards that supervisory personnel cannot validly be assigned to

² According to the Carrier’s Submission, the Graniteville collision resulted in nine deaths, 250 injuries, and the evacuation of 5,000 residents from the area around the collision. The carrier involved in that accident faced damages and costs well in excess of \$140 million.

replace Agreement-covered forces in the performance of scope-covered work. Under Rule 55.A.1, Track Inspectors are the employees assigned the responsibility for the proper inspection of the tracks, roadway, and right-of-way in each district. The Carrier's attempt to rename the work "route evaluation" is a transparent attempt to create the illusion of a difference between track inspection work and "route evaluation" work. The work performed by the Assistant Roadmasters is precisely the same work performed by the Track Inspectors on a regular daily basis, and Track Inspectors could have – and should have – been assigned to do it. None of the defenses raised by the Carrier has merit. The Carrier provided no evidence of any precedent for having the route evaluation work performed by exempt officers; the only evidence is from covered employees who have done the work themselves. "Route evaluations" are indistinguishable from track inspections, and the positions are as well. If anything, the Track Inspectors perform more duties than the Route Evaluators. The Carrier's argument that the work involved here was not exclusive to Track Inspectors must be rejected. Track Inspectors could do the work and it should have been assigned to them. With respect to the remedy, these are continuing claims, and the Organization properly identified the Claimants in the individual claims and seeks shared relief on behalf of all affected employees.

According to the Carrier, Route Evaluators and Track Inspectors do not perform the same work. Track Inspectors have responsibility for the "proper inspection of the tracks, roadway, and right-of-way" in their districts. Their job is to inspect tracks for routine maintenance. The primary responsibility of Route Evaluators is to look out for dangers and suspicious activity, on or near the track, so as to ensure safe passage of hazardous cargo trains, especially in dark territory. Their responsibilities extend beyond merely looking for track defects to potential hazards off or away from the track, such as car bombs or suspicious individuals lurking around bridges or tunnels. No one is allowed on the evaluated route until after the HazMat train passes. An important reason for using exempt employees is that the scheduling flexibility required for secure movement of these trains would be impossible to achieve using regularly scheduled Track Inspectors. There would be delays that would adversely affect the security of such trains. The Organization cannot show that such work is reserved to its members. Exempt officers have typically performed Route Evaluator service. The record includes statements from a number of active and retired exempt employees who acted as Route Evaluators as far back as the 1970's. In the decades that the Carrier has used Route Evaluators, the Organization never before

objected, and it has waived any right to do so now. Finally, the Organization's claims are burdened with fatal procedural defects, particularly its failure to identify any particular Claimants, in violation of Rules 40 and 42, and its inability to establish any damages.

From the Board's perspective, regardless of who does the work at issue, when all is said and done, some of the job functions performed by the Assistant Roadmasters on the HazMat trains are track inspection and patrol tasks very similar to some that have been historically and traditionally performed by Track Inspectors, although conducted under circumstances somewhat different from those that pertain to ordinary track inspection work. The question before the Board is whether those differences are sufficient to justify the Carrier's creation of the exempt Assistant Roadmaster positions in May 2005 to perform the work, or whether it violated the parties' Agreement when it did so.

The Board concludes that the differences are sufficient, for two reasons. First, the record establishes that there has been a longstanding practice, dating back to the 1970s, of using exempt employees as Route Evaluators. The record includes statements from nine former Assistant Roadmasters, attesting to their work as exempt Route Evaluators for "white trains" carrying spent nuclear fuel rods and/or other nuclear waste in the 1980s. The trains ran irregularly, from "once every six to eight weeks" to "maybe once a year." BMWE-represented forces were occasionally used to perform the route evaluations, but the evaluations were performed primarily by exempt employees. As a result, the Organization cannot establish that its members historically and traditionally did the work at issue and that it is preserved to them under the parties' Agreement.

Second, while route evaluation for HazMat trains and routine track inspection involve some of the same job functions, the two jobs are distinctly different. They are like the overlapping circles used in Venn diagrams, where the overlap area comprises functions both perform – and the free areas in each circle are tasks that only the one position performs. Track Inspectors perform routine track inspection on a regular schedule within a defined geographic district. The HazMat trains operate irregularly and across district boundaries, which Track Inspectors do not cross. Track Inspectors look for defects that Route Evaluators do not, and vice-versa. The Route Evaluators "ride shotgun" for the HazMat trains, looking for dangers beyond track defects.

Preventing deliberate terrorism or an accidental catastrophe like Graniteville is not normal track inspection work. The Route Evaluator position appears to have evolved naturally from the nuclear waste trains of the 1970s into a position that is separate from normal track inspection work. Because of scheduling irregularities, the work was originally assigned to exempt employees, and those irregularities continue today. The HazMat trains do not run every day, so it is not necessary to have employees assigned full-time as Route Evaluators. When a train does run, however, it is important that it not be unduly delayed, which could occur when a HazMat train crosses from one geographic operating district to another. Track Inspectors are not obligated to respond to callouts, which means that in order to ensure that a Track Inspector would be available when a train came through a specific operating district, the Carrier would have to assign Track Inspectors to these trains for all three shifts, on all of the geographic districts through which they travel.

Having examined the record, the Board concludes that Route Evaluators and Track Inspectors perform some of the same functions, but the positions are not entirely congruent. In the final analysis, Track Inspectors perform work that is track-specific for all track within a geographic district; Route Evaluators perform work that is train-specific for individual trains traveling across geographic districts. Given the history and evolution of the Route Evaluator position, it is not work that is or has been exclusive to Train Inspectors. Consequently, the Carrier did not violate the Collective Bargaining Agreement when it created Assistant Roadmaster positions to do the job.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 16th day of October 2012.